



## **LORE v. LAW** **for Section 504**

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Each of the following pairs of slides presents the "Lore," or prevailing belief and/or practice, and the "Law," or objective synthesis of the primary, pertinent legal sources. The overall focus is Sec. 504 of the Rehabilitation Act and its sister statute, the Americans with Disabilities Act (ADA) in relation to K–12 school students.

### **LORE**



1. Section 504 does not apply to parochial schools, but the ADA does.

### **LAW**



1. Section 504 applies to private, including parochial, schools that receive federal financial assistance (e.g., Title I or IDEA services). The ADA has an exclusion for parochial schools but otherwise applies to private schools regardless of funding.

### **LORE**



2. Section 504, like the IDEA, provides federal funding and state education agency supervision/support.

### **LAW**



2. Although federal financial assistance triggers Section 504, this law—unlike the IDEA—provides no federal funding. Similarly, the state has no obligation under Section 504 to provide supervision or support.

**LORE**

3. Section 504 does not require an internal complaint process; the only grievance procedure is under state law, such as the one for employees under a collective bargaining agreement.

**LAW**

3. The Section 504 regulations expressly require school districts with 15 or more employees to adopt disability-related grievance procedures that “incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging [Section 504 violations].”

**LORE**

4. Section 504 only provides for complaints to the U.S. Department of Education’s Office for Civil Rights (OCR), not a right to an impartial hearing.

**LAW**

4. The Section 504 regulations, like those under the IDEA, specifically provide for the right to an impartial hearing. In states that do not provide such hearings, the local school district has the obligation to arrange for an impartial hearing upon the parent’s request.

**LORE**

5. “Child find,” i.e., the legal obligation to evaluate students upon reasonably suspecting eligibility, does not apply under Section 504.

**LAW**

5. Both the regulations and the courts make sufficiently clear that child find applies for the broader definition of disability under Section 504 just as it does under the narrower scope of disability under the IDEA.

**LORE**

6. Unlike the IDEA, Section 504 neither requires consent for an initial evaluation nor for a 504 plan.

**LAW**

6. Although the Section 504 regulations do not address this issue, OCR has consistently taken the position that Section 504 requires consent for an initial evaluation. In contrast, neither the regulations nor OCR has been clear as to whether consent is required for services (i.e., FAPE) under Section 504.

**LORE**

7. Eligibility under Section 504 requires, among other things, an adverse effect on educational performance—i.e., special educational need.

**LAW**

7. In contrast with the IDEA, the Section 504 definition of disability—which is (a) any physical or mental impairment that (b) substantially limits (c) one or more major life activities—extends to various other major life activities that do not require educational need. Similarly, Section 504 FAPE may merely amount to the need for related services.

**LORE**

8. For Section 504 eligibility based on suspected ADHD, the parents must provide a medical diagnosis.

**LAW**

8. First, OCR has made quite clear that for Section 504 eligibility, a physician is not required; other qualified professionals may provide the requisite diagnosis. Second, OCR has made equally clear that if the district determines that a medical or other diagnosis is necessary, the district must ensure that the diagnosis is at no cost to the parents

## LORE



9. The determination of whether the impairment (e.g., ADHD) substantially limits a major life activity (e.g., learning or concentration) is with the effects of any mitigating measures (e.g., medication) that the student is receiving.

## LAW



9. The amendments to the ADA, which went into effect on January 1, 2009, specify that “the determination of whether an impairment substantially limits a major life activity shall be made *without* [italics added] regard to the ameliorative effects of mitigating measures.”

## LORE



10. All students on individual health plans (IHPs) qualify instead, as a result of the ADA amendments, for a Section 504 plan.

## LAW



10. Recent OCR policy interpretations require districts to (a) screen students on IHPs to determine which ones are subject to child find; (b) implement the requisite Section 504 notice and evaluation for those students; and (c) provide the resulting eligible students with FAPE regardless of the name of the confirming document.

## LORE



11. As a general matter, students with concussions are eligible for a Section 504 plan.

## LAW



11. Students who have experienced one or more concussions are eligible only if their condition a) substantially limits a major life activity for b) sufficient duration, which is likely at least a few months.

**LORE**

- 12. The substantive standard for FAPE under Section 504 is whether the individually determined services are reasonably calculated for educational benefit.**

**LAW**

- 12. The standard is either commensurate opportunity, which the Section 504 regulations specify, or reasonable accommodation, which the majority of courts have imported. However, in many cases, the courts do not reach this issue due to lack of the requisite intentional discrimination, typically translated as deliberate indifference, bad faith, or gross misjudgment.**

**LORE**

- 13. The Section 504 regulations require districts to provide eligible students with a "504 Plan."**

**LAW**

- 13. Unlike the IDEA regulations, which require an individualized education program (IEP) and prescribe its contents, the Section 504 regulations only provide for FAPE. The document, including its name and contents, is merely an administrative convenience for administration and enforcement.**

**LORE**

- 14. Section 504 only provides for accommodations, not either special education or stand-alone related services.**

**LAW**

- 14. The Section 504 regulations specifically require FAPE, which may be related services to access general education and/or special education.**

**LORE**

15. Section 504, as “IDEA lite,” provides consistently less protection than the IDEA does for disciplinary changes in placement.

**LAW**

15. For disciplinary changes in placement, Section 504 provides less protection for drug or alcohol use but more protection in terms of a) requiring reevaluation, and b) not providing for 45-day interim alternate educational settings.

**LORE**

16. School personnel are subject to liability for money damages under Section 504.

**LAW**

16. Unlike the IDEA, Section 504 provides for money damages but a) for the district, not its individual personnel, and b) only upon a showing of deliberate indifference, bad faith, or gross misjudgment.

**LORE**

17. Section 504 requires that parents must participate in determinations of eligibility and FAPE or, instead, permit the Section 504 coordinator to make these determinations alone.

**LAW**

17. The Section 504 regulations require that a team make these decisions, with members who are reasonably knowledgeable about a) the child (in some cases, not necessarily the parent), b) the meaning of the evaluation data, and c) the requisite FAPE.

**LORE**

**18. Because Section 504, but not the IDEA, follows the child to postsecondary education, the district must change the student's IEP to a 504 plan when graduation is imminent.**

**LAW**

**18. For double-covered children, the IEP legally fulfills the FAPE requirement (and is practically more effective for documenting the requisite eligibility in postsecondary institutions).**

**LORE**

**19. Section 504 does not apply to field trips or extracurricular activities, which are a privilege, not a right.**

**LAW**

**19. Section 504 regulations and OCR enforcement make clear that school district obligations extend to field trips, extracurricular activities, and even after-school programs offered by cooperating private organizations.**

**LORE**

**20. The 1/25/13 OCR "Dear Colleague" letter requires separate athletic teams for students with disabilities.**

**LAW**

**20. The letter and a follow-up in response to the National School Boards Association's inquiry makes clear that such separate teams are encouraged in some circumstances but not required in any circumstances.**

**LORE****21.****LAW****21.**

**For an earlier version with more detailed answers, see Professor Zirkel's "The Common Lore of Section 504" in the summer 2012 issue of the newsletter of the Council of Administrators of Special Education – *In CASE*, v. 54, issue no. 2, pp. 4-8.**

**Source for "Law" Image:**

<http://wrestlingroots.org/wp-content/uploads/2011/12/tipped-scale-400x271.jpeg>